

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

THE MUSEUM OF MODERN ART,

Plaintiff,

v.

MOMACHA IP LLC and MOMACHA OP LLC,

Defendants.

Case No. 1:18-cv-03364-LLS

**DECLARATION OF ROB BAKER  
IN SUPPORT OF PLAINTIFF  
THE MUSEUM OF MODERN  
ART'S MOTION FOR  
PRELIMINARY INJUNCTION**

I, Rob Baker, under penalty of perjury and pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the Director of Marketing and Creative Strategy at The Museum of Modern Art. I have been in this position since October 2017. I am responsible for marketing the Museum and its programs, engaging new and existing audiences, and managing the Museum identity and brand. As a result of my responsibilities marketing the Museum and its programs, and as a result of working closely with the leadership and staff of the Museum and reviewing numerous documents regarding the history of the Museum, I have a good understanding of the Museum and its programs. This declaration is based on my personal knowledge as well as my research into the Museum's history, unless otherwise stated, and if called as a witness I could and would testify competently to the facts stated herein.

2. I submit this declaration in support of The Museum of Modern Art's Motion for Preliminary Injunction.

### **The Museum of Modern Art's History and Mission**

3. Founded in 1929 as an educational institution, The Museum of Modern Art—MoMA—is dedicated to being the foremost museum of modern art in the world. MoMA manifests this commitment by establishing, preserving, and documenting a permanent collection of the highest order that reflects the vitality, complexity and unfolding patterns of modern and contemporary art; by presenting exhibitions and educational programs of unparalleled significance; by sustaining a library, archives, and conservation laboratory that are recognized as international centers of research; and by supporting scholarship and publications of preeminent intellectual merit.

4. MoMA seeks to create a dialogue between the established and the experimental, the past and the present, in an environment that is responsive to the issues of modern and contemporary art, while being accessible to a public that ranges from scholars to young children. Central to MoMA's mission is the encouragement of an ever-deeper understanding and enjoyment of modern and contemporary art by the diverse local, national, and international audiences that it serves.

5. MoMA's world-class collection includes approximately 200,000 works of modern and contemporary art, including paintings, sculptures, drawings, prints, photographs, media and performance art works, architectural models and drawings, design objects, and films. We offer a range of programs and activities aimed at educating both the general public and different segments of the community in approaching and understanding modern and contemporary art. For example, we offer a variety of online courses through Coursera and currently have over half a million enrolled learners. Many of our programs are offered at low or no cost, including free Museum admission on Friday afternoons, free admission for staff guests and staff from other

museums, reduced price student and senior admissions, free school tours and programs, and free admission for children under the age of 16 years. MoMA offers a children's program called Tours for Fours with free admission for children age four and their adult companions. We offer free admission for other groups such as military service personnel, educators, and families through family passes. We also offer reduced price admissions for different tour groups and discount programs, tour operators, and hotel and VIP tickets.

6. In addition, MoMA has one of the most active publishing programs of any art museum in the United States, and has published more than 2,500 titles. We participate in numerous book fairs each year, including the London Book Fair, the Bologna Book Fair, and the Frankfurt Book Fair.

7. In 2000, MoMA affiliated with P.S.1 Contemporary Art Center, which became a supporting organization of MoMA, creating the largest platform for contemporary art in the United States—and one of the largest in the world. Ten years later, P.S.1 was renamed MoMA PS1 to better reflect its relationship with The Museum of Modern Art.

8. Through jointly curated initiatives like Greater New York, the Elaine Dannheisser Projects Series, and the Young Architects Program, a shared website, and dozens of individually produced exhibitions and programs, MoMA and MoMA PS1 present a dynamic and varied offering of some of the most thought-provoking art produced today, together forming MoMA's leading program of modern and contemporary art. While each institution has its own mission statement, we work together on a daily basis, share curatorial perspectives and information, and have a common goal to provide the most educational, engaging and incisive programs possible.

9. Since 1939, MoMA has been located at 11 West 53<sup>rd</sup> Street, between Fifth and Sixth Avenues, in New York City. MoMA also owns a facility in Long Island City, Queens—MoMA QNS—where it operated an exhibition space between 2002 and 2004.

10. We currently have over 120,000 individual and family members. We had nearly 12 million visitors in the four-year period between 2014 and 2017, and approximately 2.2 million people have visited MoMA since July 2017. Approximately half of our visitors are first-time visitors. Our award-winning website, [www.moma.org](http://www.moma.org), had over 13 million unique visitors in the past year.

### **The MoMA Brand**

11. The Museum has been generally known as “MoMA” for nearly 50 years, with the name appearing on the building itself, on banners, signs and museum brochures, on merchandise, on promotional materials, and on our website at [www.moma.org](http://www.moma.org). Attached hereto as Exhibit 1 are true and correct copies of some of our signs and promotional materials bearing the MoMA mark.

12. Between 1967 and the mid-1980s, we presented our name and logo as MOMA, in all capitalized letters. Starting in the mid-1980s, we transitioned from MOMA to MoMA, with a lowercase o between the two capitalized M’s. We currently use the iconic logo shown below (the “MoMA Logo”) in our promotional and marketing materials:



13. The MoMA Logo itself has received significant press coverage, including in *The New York Times*. The logo uses a proprietary font that is known “MoMA Gothic,” which was developed exclusively for MoMA in 2003 based upon the ITC Franklin Gothic font. The MoMA

Logo can be used either horizontally or vertically, and it appears in a vertical format on a “blade” sign on the front of the Museum itself, as shown below, as well as in other signage and on products:



Attached hereto as Exhibit 2 is a true and correct copy of *The New York Times* article regarding the MoMA Logo.

14. We have used the MoMA trademark in virtually all communications with the public, press, artists, and sponsors since 1967. The MoMA trademark and logo are featured prominently on MoMA’s website, [www.moma.org](http://www.moma.org), and in a variety of materials, including on signage, brochures, and websites, and in fliers, advertisements, and social media posts for our core museum services as well as all of the other goods and services that we offer in connection with our museum services and programs. This includes the exhibitions themselves, educational programs, publications, merchandise, and amenities such as restaurants, bars, cafés, and shops. The MoMA mark and logo are also emblazoned by our licensees on numerous objects that are sold through one or more of our MoMA Design Stores as well as through third-party retailers, and online. Attached hereto as Exhibit 3 are true and correct copies of a selection of licensed products bearing the MoMA mark.

15. We use the MoMA mark and logo to promote these goods and services throughout the United States. We promote our goods and services through traditional print media, including third-party publications such as *The New York Times*, *The New York Review of Books*, *The Art*, *The Wall Street Journal*, *New York*, *The New Yorker*, *Artforum International*, *Art in America*, *Even*, *Sculpture*, *Time Out New York*, *Where New York*, *City Guide*, *The Pride Guides*, *Frieze*, *Cultured*, *Variety*, *Hollywood Reporter*, and *Metropolis*. We also promote our goods and services through MoMA's own publications such as our "MoMA Membership Happenings" and "MoMA What's New" newsletters, and in advertisements displayed publicly throughout New York, including in subway cars and stations, on posters, billboards, light pole banners, and kiosks, and via marketing street teams. We also work closely with NYC & Company, the official destination marketing organization for the five boroughs of New York City, and we attend ten international and domestic travel and tourism industry trade shows each year and distribute customer-facing brochures for our gallery, restaurant and dining services at many of the city's major hotels and attractions, in key outdoor areas, and along the Amtrak Northeast corridor. Attached hereto as Exhibit 4 are true and correct copies of some recent advertisements bearing our MoMA mark and attached hereto as Exhibit 5 are true and correct copies of some of our recent brochures bearing our MoMA mark.

16. We also promote our services extensively online and through social media. In addition to our own website at [www.moma.org](http://www.moma.org) and our blogs, Inside/Out (hosted on our website), and Insecurities and Items (hosted on Medium.com), we have an active presence on Twitter, Instagram, and Facebook. We currently have over 5.5 million followers on Twitter, 3.4 million followers on Instagram, and 1.96 million followers on Facebook. We also have a YouTube channel that has almost 175,000 subscribers. We also promote our services in a

number of digital media outlets, including *The New Yorker*, *The New York Times*, WNET, WNYC, WQXR, *The New York Review of Books*, *New York Magazine*, Vice, Hyperallergic, Gothamist, Listing Projects, Art Slant, NY Arts, Art info, and Spin Media. Attached hereto as Exhibit 6 are true and correct copies of our Facebook page and some recent posts on Twitter and Instagram, all bearing our MoMA mark.

17. As a result of MoMA's world-class reputation, and our expenditures and efforts to promote the MoMA brand and the Museum, the MoMA Marks and MoMA Logo are famous among the U.S. population. The MoMA mark and MoMA Logo signify the high quality of MoMA's museum services and programs, as well as related goods and services, including but not limited to restaurants, bars, cafés, publications, merchandise, and educational programs. The MoMA mark and MoMA Logo have incalculable reputation and goodwill.

#### **Amenities at The Museum of Modern Art**

18. Amenities such as dining facilities are an important part of any museum, including MoMA. Accordingly, we have offered and continue to offer a variety of dining services to our visitors. We currently have two cafés within the Museum, Café 2 and Terrace 5, and two restaurants, The Bar Room and The Modern. Between 1993 and approximately 2002, visitors enjoyed their meals at the Sette MoMA restaurant, which was also operated within the Museum. From 2002 to 2004, when the Museum operated out of MoMA QNS, there was a café located inside the MoMA QNS facility. Attached hereto as Exhibit 7 is a true and correct copy of our current MoMA Dining Guide. Attached hereto as Exhibit 8 is a true and correct copy of a photograph of a dessert item served at MoMA's Café 2.

19. Our The Modern restaurant, founded by Danny Meyer's Union Square Hospitality Group and operated by his ArtFood LLC, offers a fine dining experience. The Modern has

earned four James Beard Foundation Awards, three stars from *The New York Times*, and two Michelin stars. Located within MoMA's museum building, The Modern is open to museum visitors and the general public alike.

20. We also operate three retail stores in New York City under the name MoMA Design Store. One store is located across the street from MoMA's 53<sup>rd</sup> Street museum building, another is located within the museum itself, and the third is located downtown in the Soho neighborhood. These stores feature carefully selected products as well as products developed by MoMA that embody MoMA's vision of good design, ranging from reproductions of artwork in the MoMA collection, home items, kitchenware, coffee and tea articles, to jewelry, accessories, books, and kids' items. In addition to the New York stores, we have two MoMA Design Stores in Japan. MoMA Design Store also sells products online at <https://store.moma.org/>. Attached hereto as Exhibit 9 is a true and correct copy of photographs of the signage on our New York MoMA Design Stores. Attached hereto as Exhibit 10 is a true and correct copy of excerpts from the MoMA Design Store's online store at <https://store.moma.org/>.

### **Defendants' Business and Willful and Wrongful Conduct**

21. Defendants operate an art gallery and café that opened to the public early this month in storefront space at The Hole art gallery in the Bowery in the Lower East Side of Manhattan, in close proximity to MoMA's Soho design store. They call it MoMaCha. I understand that Defendants have also applied to register MOMA as a trademark for café and other services, although it does not appear that they have started to use MOMA as a trademark to identify their services as of this date. MoMA has MOMA registered as a word mark—MOMA—and thus MoMaCha's MOMA application is identical to one of MoMA's registered marks.



22. Defendants also have a website at [www.momacha.com](http://www.momacha.com). That website features images of photography and artwork and promotes the art gallery and café. According to the website, the current art installation at the MoMaCha art gallery and café features a contemporary artist. Attached hereto as Exhibit 11 is a true and correct copy of excerpts from the [www.momacha.com](http://www.momacha.com) website.

23. In addition, MoMaCha is promoted on The Hole's retail website, which offers art pieces and other art and design-related products for sale. Attached hereto as hereto as Exhibit 12 are true and correct copies of pages from The Hole's online shop.

24. Defendants have also been promoting their art gallery and café business through social media such as Facebook, Instagram, and Twitter. Their Instagram handle is @momachanyc, and on both Instagram and Twitter, the hashtags #MoMaCha and #momacha are used to promote and identify Defendants' MoMaCha gallery and café. Attached hereto as Exhibit 13 are true and correct copies of some of Defendants' social media postings.

25. I understand that defendants intend to open two or three additional art-café in New York City this year, which are also to be called MoMaCha. Attached hereto as Exhibit 14 is a true and correct copy of a March 23, 2018 email regarding the opening preview for the MoMaCha gallery and café.

26. The word MoMaCha in Defendants' logo is white or black with each syllable in MoMaCha having initial capitalization and a separate line (the "MoMaCha Logo"):



27. Defendants also display the MoMaCha Logo vertically on a coffee cup in their promotional materials, similar to the MoMA blade that appears on the front of the Museum, as shown below:



28. Defendants' MoMaCha Logo is stunningly similar to our MoMA Logo, with almost all of the same visual elements, including identical colors and similar capitalization:

MoMA Logo

**MoMA**

Infringing MoMaCha Logo



29. I believe that there is no possibility that Defendants were not aware of MoMA or of our famous MoMA mark prior to starting their business earlier this month. In fact, the MoMA Design Team—MoMA's in-house design studio—has analyzed the font used by Defendants and determined that it is ITC Franklin Gothic Heavy(weight), which makes it almost identical to our MoMA Gothic font, as shown below. In the image on the left, the MoMA Design Team overlaid ITC Franklin Gothic Heavy font in fuchsia over Defendants' white font in its logo. This font appears to be identical to that used by Defendants. In other words, Defendants chose to use the

very font—ITC Franklin Gothic Heavy—on which our proprietary MoMA Gothic font is based. For comparison, Defendants’ original logo is on the right:

**Overlay Font**

**Defendants’ Font**



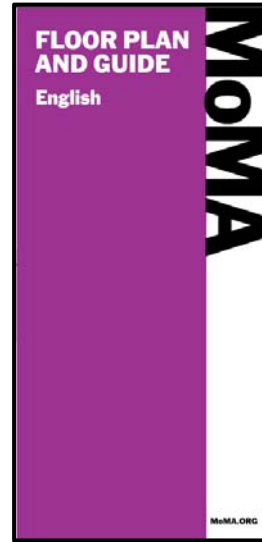
30. MoMA’s distinctive MoMA proprietary font was developed exclusively for MoMA and is based upon the Franklin Gothic font. Since 2013, MoMA has used versions of its proprietary font as the sole typeface to be used for the majority of MoMA’s exhibition identities to create visual consistency. As such, the MoMA proprietary font is widely visible and recognizable to all Museum visitors. Attached hereto as Exhibit 15 is a MoMA blog post discussing MoMA’s typeface.

31. Our MoMA Design Team also found the MoMaCha item below online. It is clearly based upon the design of our prior visitor guide:

MoMaCha Image



MoMA Visitor Guide



32. Our belief that Defendants intentionally copied MoMA and the MoMA mark is consistent with articles that we have seen explaining the derivation of the MoMaCha mark—it is described as a combination of the words “MOMA” and “matcha” and a play on MoMA’s name. One of Defendants’ founders even conceded that MoMaCha “mashes art and matcha,” implying that the MOMA portion of the name stands for art because it copies the MoMA trademark used by The Museum of Modern Art. Other articles have also noted Defendants’ combination of matcha and modern art. For example, “MoMaCha Turns Green Tea Into a Modern Art Experience.” published in *Beford + Bowery*, and “This Trippy Café Turns Your Matcha Experience into Modern Art,” published in *Secret NYC*. Attached hereto as Exhibit 16 are true and correct copies of these articles.

33. We have been receiving emails from others commenting on the similarity of fonts and logos and questioning the relationship of MoMA to Defendants’ MoMaCha gallery and café. Attached hereto as Exhibit 17 are true and correct copies of some of these emails.

34. In my view, Defendants are clearly attempting to take advantage of the MoMA brand, which is unquestionably famous within the modern and contemporary art space, to

promote their newly launched art gallery and café business. They might even be hoping that they will get some free publicity if they force MoMA to file a lawsuit to stop this blatant infringement of our MoMA mark and logo.

35. Filing this lawsuit, however, is not a step that MoMA has taken lightly. In fact, MoMA has never previously needed to resort to a federal lawsuit to protect its MoMA brand and prevent confusion on behalf of its visitors. In this case, we sent a letter on March 29, 2018 to Defendants regarding their use of the MoMaCha name and mark and applications to register the marks MOMA and MOMACHA. We asked that Defendants cease use of the MOMA and MOMACHA marks and abandon the MOMA and MOMACHA trademark applications. Defendants' attorney told us that Defendants would not comply with our request, leaving us no choice but to file this lawsuit. Attached hereto as Exhibit 18 is a true and correct copy of MoMA's letter.

36. Defendants' infringement is already causing significant confusion and is likely to continue to cause confusion among consumers who are likely to believe that Defendants' MoMaCha art gallery and café is affiliated with or sponsored by MoMA. Because of its reputation as a world-class museum, a large percentage of MoMA's visitors come from outside of New York City. These visitors are likely to put MoMA's offerings high on their lists of sites to see while in New York, including the Museum itself, the MoMA Design Stores, and MoMA PS1. If they hear of or happen to come across Defendants' MoMaCha gallery and café during their visit to the city, I have no doubt that they will believe, mistakenly, that it is another offering from MoMA.

37. In fact, Defendants have created a name that will be understood as a play on the MoMA mark—similar to MoMA's own MoMA QNS and MoMA PS1 marks. In Defendants'

case, they combined “cha,” which means “tea” in many Asian languages, with the MOMA prefix to create MoMaCha, which sounds like a tea shop owned and/or operated by MoMA, similar to how MoMA QNS, MoMA PS1, and MoMA Design Store refer to venues owned and/or operated by MoMA. The fact that Defendants show *art* in their café, and that the café is located in the storefront for The Hole, which is an *art* gallery, only exacerbates the likelihood that visitors will assume that there is a connection between MoMA and Defendants’ services.

38. MoMA is concerned that visitors to Defendants’ café and art gallery will feel that they were tricked by the name into believing that there is an association with MoMA when there is not. MoMA does not treat visitors to New York in this fashion and does not want its name to be used to trick visitors to New York into patronizing a business that is not associated with MoMA in any way.

39. MoMA is also very concerned that its world-class reputation will be diminished or tarnished if visitors or consumers draw a connection between MoMA and Defendants, or mistakenly believe that Defendants’ café and art gallery is associated with or sponsored by MoMA when it is not. MoMA is known for its exceptional art collection and the high quality of its exhibitions, programming, and other services. This excellence is carried over to its dining offerings, including a destination restaurant with *two* Michelin stars, The Modern. In the age of nearly instant online reviews, MoMA’s reputation for excellence now inappropriately rests in the hands of Defendants and their MoMaCha art gallery and café.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on April 19, 2018, in New York, New York.

By:  \_\_\_\_\_